Meeting of the States Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction

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A Response to BWC/MSP/2012/WP.11: "We Need to Talk about Compliance"

Submitted by the United States of America

Introduction

1. The United States of America places great importance on compliance with the Biological Weapons Convention. Furthermore, as we have stated previously, maintaining and promoting confidence that parties are abiding by their commitments is essential to **any** treaty. The BWC poses special challenges in this regard. The broad nature of its obligations, the intent-based nature of the Article I prohibition, the inherently dual-use nature and widespread availability of the materials and technology in question, and the potential significance of even small quantities of pathogenic material all combine to render traditional arms control approaches to enhancing assurance ineffectual. The increased significance in recent years of non-state actors as an element of the international biological weapons (BW) threat the Convention seeks to address only exacerbates this problem. As a result, there is no simple "checklist" of specific actions or activities that may be applied to determine that a State Party is complying with all its obligations under the Convention.

2. There are thus no easy answers to the challenge of how to increase confidence in compliance with the BWC. This makes it all the more important for States Parties to exchange views on how they think about compliance and to discuss ways in which they can demonstrate greater transparency, with the aim of reducing doubts or concerns about their actions or intentions and considering options for addressing such concerns should they arise.

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Compliance with the Biological Weapons Convention (BWC)

3. In the view of the United States, each party to a treaty has both the right and the responsibility to make its own determinations about whether or not other Parties are complying with their obligations, and to address any concerns other Parties may have. This is true not only in the context of the BWC, but also in treaties that include a verification regime or other compliance-related mechanisms, which exist to provide additional information to inform such judgments, not to supplant them. It is also important to be mindful that "compliance" is not a one-time event, but a continuous state, and thus judgments about compliance are likewise an ongoing process.

4. While a definitive compliance "checklist" is not possible, it is certainly possible to identify key elements that might be taken into consideration in evaluating compliance. Any such judgment must consider the basic obligations of the Convention. Compliance requires a State Party to **refrain** from certain actions (e.g., developing, stockpiling, or transferring biological weapons) set out in Articles I and III. It also requires a Party to **take** a number of actions, the most critical of which are:

- To eliminate any existing biological weapons or related facilities, in accordance with Art. II.
- To establish appropriate measures to ensure that the Party never transfers biological weapons to any recipient, directly or indirectly, or in any way assists in the acquisition of biological weapons. In general, this is accomplished through efficient and effective national export licensing systems to ensure that materials are only exported for permitted purposes. Given the Convention's intent-based prohibition, flexible "catch-all" provisions are an essential element of such systems.
- To adopt "any necessary measures" to "prohibit and prevent" anyone under a Party's jurisdiction or control from developing, acquiring, or stockpiling biological weapons.

5. While the Convention does not set out more detailed requirements for "any necessary measures," the Final Documents of seven Review Conferences (RevCons) and the Common Understandings reached under three successive Intersessional Work Programs provide considerable guidance. To be effective, laws and regulations should be clear, enforceable, and actively enforced. They should **prohibit** conduct proscribed by the Convention, and provide for meaningful penalties to deter such action, but they should also aim to **prevent** such action. Such prevention requires a Party to exercise some mixture of oversight, regulation, and outreach for certain permitted activities in order to guard against misuse. Examples include regulations on biosafety, biosecurity, and oversight on the possession, use, and transfer of biological agents and toxins that have the potential to pose a severe threat. We agree with the UK, Switzerland,[1] and Japan[2] on the importance of engagement with civil society, particularly the scientific community, to promote awareness and a culture of responsibility and/or provide oversight of research and development (R&D). In addition, the precise scope and nature of activities necessary to ensure compliance may vary from one Party to another. We agree with Switzerland and the UK that a judgment about a Party's compliance with the necessary national implementation measures must take into account the level of its development and be realistic about the implementation burden with which some Parties can cope.

[1] BWC/MSP/2013/MX/WP.12.
[2] BWC/MSP/2013/MX/WP.18.

6. The threat of biological weapons acquisition and use by non-state actors has become increasingly clear and relevant. The United States assesses that it is at greater risk of biological weapons attack by terrorists than by nation states. Accordingly, the importance of Articles III and IV as elements of State Parties' compliance with the Convention is greater than it once was. Thus, our collective thinking about compliance with the BWC and how to demonstrate it must take into account this fundamental shift in the BW threat. In this connection, it is worth noting that all States now have binding obligations under United Nations Security Council Resolution 1540 (2004), which reinforce the Article III and IV commitments of Parties. The obligations are to: (a) "refrain from providing any form of support to non-State actors that attempt to develop, acquire, manufacture, possess, transport, transfer or use biological weapons and their means of delivery;" (b) "adopt and enforce appropriate effective laws which prohibit any non-State actor" from engaging in or attempting to engage in a range of proliferation activities; and (c) "take and enforce effective measures to establish domestic controls," including accounting for, securing and physically protecting related materials in production, use, storage and transport, as well as border and export controls, to prevent non-State actors from exploiting legitimate activities for proliferation purposes.

7. Given the dual-use nature of the relevant knowledge, materials, and equipment and the other factors mentioned above, it is often not possible to reach a definitive conclusion about whether or not another Party is fully complying with its obligations under the Convention, nor is it easy to envision a mechanism that would substantially change this situation. As a result, the question that confronts States Parties is ultimately about the level of confidence we share in the compliance of States Parties, individually and collectively – or, put another way, the level of concern we have about non-compliance. In its paper on this subject,[3] the United Kingdom of Great Britain and Northern Ireland usefully listed a range of activities, attitudes, and behaviors that – while generally neither "proving" nor "disproving" a State Party's compliance – tend to influence confidence concerning its activities and intentions.

Better demonstrating BWC compliance and thereby enhancing assurance for other Parties

8. It is important to enhance assurance, but it is not possible to have absolute certitude about another Party's compliance, especially since the basic prohibitions of the BWC address not only capabilities, but also intent. As the United Kingdom notes, single actions are rarely definitive, though the continued presence of the positive factors included in its paper – some of which have to do with intent – enhances assurances of compliance. Indications of intent, while imperfect, reflect the practical reality that a Party can, through its overall actions and behavior, increase or decrease any apprehension other Parties may have about its compliance.

9. Indeed, confidence in compliance can be increased through greater transparency regarding activities and, in particular, national implementation (where current transparency measures are most notably weak). Means of enhancing transparency include providing and regularly updating information through the existing mechanisms of confidence-building measures (CBMs), the National Implementation Database (NID), and the report of the BWC Implementation Support Unit (ISU) to BWC Review Conferences on compliance, as well as participating in regional efforts to strengthen implementation, such as those that have taken place in the past year in Chile, Malaysia, and Mexico. Relevant reporting to the

[3] BWC/MSP/2013/MX/WP.1.

1540 Committee also helps increase confidence, especially as the submissions (and in most cases the matrices prepared by the Committee) are public documents. Indeed, as suggested in the working paper that we, along with Australia, Canada, France, Germany, Netherlands, and the United Kingdom submitted to the 2013 Meeting of States Parties,[4] many Parties could provide information on national BWC implementation with little additional effort by simply submitting the relevant portion of their national 1540 matrix or any BWC-relevant legislative surveys that may have been conducted.

10. We agree with Switzerland that demonstrating compliance consists not only of Parties communicating that they are in compliance by providing relevant information, but also of others considering the information and providing feedback. For this reason, we believe it would be valuable for Parties to consider **how** such information could be used to enhance assurances of compliance. As we proposed at the Seventh RevCon, we also support BWC Parties taking voluntary steps to increase transparency and build confidence, such as through visits to biodefense facilities like those that the United States has conducted[5] and that Switzerland recently hosted at its Spiez facility.

11. We see the concepts of "peer review," "compliance assessment," and other voluntary transparency measures as opportunities to strengthen national implementation itself and to enhance transparency about that implementation, rather than as approaches to determining a Party's compliance. Finally, participating in and reporting on Article X efforts, including in the ISU's Assistance and Cooperation Database and in Article X reports by Parties, can increase confidence that Parties are cooperating on "the further development and application of scientific discoveries in the field of biology for prevention of disease, or for other peaceful purposes," as they have undertaken to do in that article.

Role for declarations and whether information additional to that in CBMs would enhance assurance of compliance

12. The United States does not see a role for "declarations" in demonstrating compliance, except to the extent that the information provided for CBMs, the NID, and the ISU's report to RevCons on compliance can be defined as falling into that category (and, indeed, the CBM forms **are** referred to as "declarations"). Our analysis is that a legally-binding obligation to disclose a substantial number of sites defined as relevant to the Convention, which is part of many concepts involving declarations, would not meaningfully enhance the ability to evaluate most Parties' compliance. The issue here is, again, the very large number of facilities possessing dual-use materials and technology that could be used for BW purposes and the paucity of reliable indicators of use for a prohibited purpose.

13. With regard to CBMs, as we suggested in 2012 and have reiterated since then, we believe that Parties should consider not only how to increase the number of Parties submitting CBM reports, but also how to make the information they contain more readily accessible and how to make constructive use of it.[6] And as we proposed in a 2013 MSP working paper, efforts toward this end – in addition to creating electronic means of submitting CBMs – might include: (a) a comprehensive anonymous ISU survey of all States Parties to learn of specific impediments to CBM participation; (b) a commitment by Parties to review the survey results and use them to devise effective actions for consideration at the Eighth Review Conference; and (c) the establishment of a CBM

[4] BWC/MSP/2013/WP.4.
[5] BWC/MSP/2012/WP.3.
[6] BWC/MSP/2012/MX/WP.4.

assistance network, to be coordinated by the ISU, which would facilitate voluntary information sharing among ministry officials ranging from the very experienced to those for whom CBM submission is a new responsibility.[7] While we think CBMs might benefit from further streamlining and restructuring and are an appropriate tool for greater transparency about implementation, we find it difficult to assess whether additional information on CBMs would enhance assurance without knowing more about why Parties are not participating in them in larger numbers and not making more use of information provided by others.

Further development of Article V mechanisms, including consideration of mutually agreed visits to sites of compliance concern

14. Article V provides a valuable mechanism for enhancing assurances of compliance. Parties should discuss this article further, with a view to making exercise of it seem less confrontational and to enhancing assurance of compliance. Article V provides considerable flexibility regarding the subject of consultations under it. While not explicitly identified as Article V consultations, many bilateral and multilateral exchanges that take place between and among BWC Parties, including those regarding national implementation, CBMs, and cooperation and assistance, are consistent with its terms and spirit, which are focused on cooperation to resolve questions and address problems regarding implementation of the Convention. Such consultations, whether they have an Article V label or not, can be used to enhance assurance and strengthen the Convention in other ways without necessarily raising a charge of noncompliance.

15. We agree with the United Kingdom that the 1991 Consultation Meeting arrangements for Article V could be revisited for the purpose of finding ways to enhance confidence in compliance. For example, as we proposed at the Seventh Review Conference, it may be valuable to develop illustrative examples of options Parties might employ in addressing doubts and ambiguities during Article V consultations.[8]

16. While it might be possible to develop elements to lend greater structure to the process of raising questions and concerns under Article V, such as timelines for responses, on the whole the flexible nature of Article V is an asset and should be preserved. Consultation and cooperation to address any questions or problems arising with respect to implementation of the Convention or its provisions has a decidedly broad scope, encompassing not only raising specific concerns about a State Party's compliance (whether bilaterally or multilaterally) but also, for example, efforts to develop clearer shared understandings of how to implement Article IV and efforts to assist other Parties with national implementation or making CBM reports.

17. Mutually agreed, voluntarily hosted visits to sites of concern have long been an option that is available to States Parties to address questions or concerns, and may or may not prove useful, depending on the nature of the concern and the behavior of the States Parties involved. The United States believes, however, that it would be counterproductive to develop detailed rules or processes for such visits, as flexibility is critical.

[7] WC/MSP/2013/WP.1.
[8] BWC/CONF.VII/WP.23.

Article VI mechanisms and the role of United Nations Secretary General's Mechanism for Investigation of Alleged Use (UNSGM)

18. The provisions of Article VI have never been utilized, but ample opportunity exists at BWC meetings to discuss them. In the event of an allegation of BW use, the United Nations Secretary-General's Mechanism would, in general, be the most suitable vehicle for clarifying the concern. Such an investigation could be launched at the request of the United Nations Security Council in response to an Article VI complaint, but could also be initiated by the United Nations Secretary-General in response to a request from a BWC State Party or other United Nations member state, in which case the results could inform an Article VI complaint to the Security Council. We support taking reasonable steps to strengthen the United Nations Secretary-General's Mechanism's operational capacity to investigate allegations of BW use, particularly the development of concepts of operations and standard operating procedures.

The potential impact of life sciences advances on enhancing assurance of compliance

19. We agree that the discussion of enhancing assurance should take into account the pros and cons of the potential impact of advances in science and technology. We agree with the United Kingdom that forensic epidemiology can be of great utility in investigating possible violations and that advances in technology, particularly bioforensics, are highly relevant in the support of Article VI investigations. However, our assessment is that some advances (e.g., disposable bioreactors, improved containment and decontamination techniques, and improvements in aerosolization technologies for peaceful purposes) might decrease the ability to reliably detect noncompliance.